

Retailers' Occupation Tax is imposed upon persons selling canned computer software at retail. See 35 ILCS 120/2. (This is a GIL).

October 5, 2000

Dear Xxxxx:

This letter is in response to your letter that was received in our office on June 5, 2000. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c) which can be accessed at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

In your letter, you have stated and made inquiry as follows:

COMPANY is presently updating it's sales and use tax files in an effort to assure compliance with each state's sales tax laws. We would appreciate your written opinion as to the taxability of the various transactions which constitute COMPANY's gross sales. A detailed description of each type of sales transactions follows. Please bear in mind that COMPANY maintains no permanent business residence in any state except California.

A. Software License Fee

A flat monthly charge for the use of COMPANY's copyrighted canned PC system software. Title to the software remains with COMPANY and customers have only the right to utilize the software under a limited license agreement.

B. Installation Fee

A separate one-time fee covering the initial software set-up and training of user personnel at their site. This is a mandatory fee in which the training and software set-up fees are billed together as one charge on one invoice.

C. Miscellaneous

Clients might also be charged for supplemental training consisting of training fees and all related charges, airfare, car rental and incidentals. COMPANY's clients are also rebilled for freight when we ship data processing disks, hardware, and other supplies. Title is transferred when received by the client.

D. Rankings

These reports came from stored data files covering all demographic information from BUSINESS. Reports are printed at COMPANY and shipped, as ordered by the client. Fee is charged on a per-page basis.

E. A.C. Nielsen TV Data

COMPANY processes TAXPAYER demographic data, copies data onto floppy diskettes, and ships them to television station clients. COMPANY charges an annual fee for production of these diskettes.

In addition to your comments as to the taxability of these various transactions, we would appreciate you sending us your latest state sales tax handbook or pamphlet.

If you have any questions regarding the above, please call me at #####.

The sale at retail of "canned" software intended for general or repeated use is subject to Retailers' Occupation Tax. See 86 Ill. Adm. Code 130.1935, enclosed. Please note that the sale of all canned software to Illinois users is considered to be a taxable sale of tangible personal property regardless of whether it is transferred by tangible or electronic means, Section 130.1935(a).

Charges for set-up or installation can be exempt if they are separately stated from the selling price of canned software. Please refer to 86 Ill. Adm. Code 130.1935(b).

In general, gross receipts vendors receive from computer software licenses are subject to Retailers' Occupation Tax, unless the license agreements contain certain conditions. Licenses of software may not be subject to tax if the licenses meet all the criteria set out in 86 Ill. Adm. Code 130.1935(a)(1)(A-E). Please see the guidelines contained in the enclosed copy of 130.1935.

In order to be non-taxable, licenses must include the following provisions: 1. written agreements signed by licensors and customers; 2. restrictions limiting customers' duplication and use of the software; 3. restrictions prohibiting customers from licensing, sublicensing or transferring the software to unrelated third parties; 4. policies or provisions that vendors will provide another copy at minimal or no charge if customers lose or damage the software; and 5. requirements that customers destroy or return all copies of the software to vendors at the end of license periods.

Regarding provision #4, the Department has deemed software license agreements to have met this criterion as long as vendors' records reflect policies of providing copies of software at minimal or no cost if licensee customers lose or destroy the software.

Provision #5 requires customers to destroy or return all copies of the software to vendors at the end of license periods. The Department has deemed perpetual license agreements to qualify for this criterion even though no provisions are included in the agreements requiring the return or the destruction of the software.

Sales of tangible personal property are subject to Retailers' Occupation Tax/Use Tax in Illinois. The sale of standard or non-customized reports transferred on a disk or the sale of hardware or other supplies to an end-user is a retail sale of tangible personal property subject to tax. The provision of supplemental training without the transfer of tangible personal property would not be subject to sales tax in Illinois.

Whether freight charges may be deducted by retailers in calculating Retailers' Occupation Tax liability depends not upon the separate billing of such freight charges but upon whether the charges are included in the selling prices of the property or are contracted for separately by purchasers and retailers. The best evidence that freight charges were agreed to separately and apart from selling prices are separate and distinct contracts for freight. Assuming the existence of separate contracts, freight charges can be deductible so long as they are actually reflective of the actual costs of freight or transportation. To the extent that freight charges exceed the costs of freight or transportation, the excess charges are subject to tax. Please see the enclosed copy of 86 Ill. Adm. Code 130.415.

Mail order delivery charges are deemed to be agreed upon separately from the selling price of the tangible personal property being sold so long as the mail order form requires a separate charge for delivery and so long as the charges designated as transportation or delivery or shipping and handling are actually reflective of the costs of such shipping, transportation or delivery. To the extent that such charges exceed the costs of shipping, transportation or delivery, the excess charges are subject to tax. See Section 130.415(d).

If you wish to obtain a complete copy of the Department's administrative rules on the Illinois Retailers' Occupation Tax, Use Tax, Service Occupation Tax, and Service Use Tax, we request a minimal fee to defray photocopying costs. You may obtain this sales tax rulebook by sending \$6.50 to this office, attention Margaret Forth.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at [www.revenue.state.il.us](http://www.revenue.state.il.us). If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b).

Very truly yours,

Karl W. Betz  
Associate Counsel

KWB:msk  
Enc.